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No. 76-1136

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT J. HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on five counts of filing false individual income tax returns and 17 counts of filing false corporate income tax returns, all in violation of 26 U.S.C. 7206(1). The district court sentenced him to concurrent 18-month prison terms on each of the 22 counts and fined him $5,000 on two of the counts. The court of appeals affirmed (Pet. App. A-1 to A-3).

The proof showed that petitioner filed corporate tax returns on behalf of three corporations of which he was president and a 50 percent shareholder. Each corporation owned a one-third section of a 250-unit apartment complex. Petitioner had two associates, Frank Racioppi and Michael Sadin, each of whom owned 25 percent of the stock of each of the three corporations. Racioppi was

granted immunity in the jury's presence (App. 263 *et seq.*)[1] and thereupon testified on behalf of the government. The 17 corporate tax returns contained inflated expense figures to the extent of approximately $380,000. The corporations falsified their expense accounts by making checks payable to ostensible subcontractors, forging the endorsements of the payees, cashing the checks and dividing the proceeds among petitioner, Racioppi and Sadin. Petitioner's individual returns failed to report as income approximately $180,000 which he received from the false expense scheme (App. 676-677, 691, 709-710, 721). By 1974, petitioner had secreted the proceeds of the false corporate expense deductions in at least seven different safe deposit boxes (App. 1018-1022).

1. Petitioner argues (Pet. 7-11) that the trial court erred in refusing to require the government to turn over to the defense an affidavit of Sadin, an unindicted co-conspirator, and to disclose exactly what took place in the meetings prior to trial between representatives of the government and Racioppi, another unindicted co-conspirator. Both rulings were well within the trial court's discretion. When defense counsel requested the production of the Sadin affidavit (App. 393), the government declined on the ground that it did not tend to exculpate petitioner. See *Brady* v. *Maryland*, 373 U.S. 83. After examining the affidavit the trial judge found that it was not "*Brady* material" and properly refused to order the government to produce it (App. 391-393, 580). See *United States* v. *American Radiator & Stand. San. Corp.*, 433 F. 2d 174, 202 (C.A. 3), certiorari denied, 401 U.S. 948. Although petitioner claims (Pet. 8) that

[1]"App." refers to the Appendix filed in the court of appeals.

defense counsel needed the Sadin affidavit in order to decide whether to call Sadin as a witness, the defense was free to talk to Sadin in order to determine whether to seek his testimony.[2]

2. Petitioner further argues (Pet. 12-14) that he was deprived of Sixth Amendment rights when the case was transferred for trial from Newark, New Jersey, to Trenton, 70 miles away. After the indictment was returned in Newark, the judge to whom the case was assigned recommended to the Chief Judge of the district that the case be transferred because of a conflict in trial schedules and because petitioner's counsel had requested the judge to recuse himself (App. 172-173). The Chief Judge thereupon transferred the case to Trenton, which is within the same judicial district.

District courts have broad discretion to determine place of trial within the district. *United States* v. *Addonizio*, 451 F. 2d 49, 61 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Lewis*, 504 F. 2d 92, 97-98 (C.A. 6), certiorari denied, 421 U.S. 975; *United States* v. *Cates*, 485 F. 2d 26, 28 (C.A. 1); cf. Rule 18, Fed. R. Crim. P. An accused has no constitutional right either

[2]Relying upon *Giglio* v. *United States*, 405 U.S. 150, petitioner further argues (Pet. 10-11) that the government was required to disclose "what exactly took place" in the meetings between the prosecutors and Racioppi. But *Giglio* holds only that the government must disclose any promises it has made to a witness in exchange for his testimony. Here, the government made such a disclosure and granted Racioppi immunity in the presence of the jury (App. 263-267). Moreover, petitioner cross-examined Racioppi very extensively regarding his receipt of immunity and the circumstances leading up to it (App. 465-466, 629-631). It was therefore well within the trial court's discretion to refuse petitioner's request for disclosure of the details of the prosecutor's meetings with Racioppi. *United States* v. *Hykel*, 461 F. 2d 721, 727-728 (C.A. 3).

to be tried at any particular place within a judicial district or to have jurors drawn from the entire district. *Zicarelli* v. *Gray*, 543 F. 2d 466, 475-482 (C.A. 3). Indeed, the Speedy Trial Act provides that, in order to insure a speedy trial, the court may set the case for trial at any place within the district. 18 U.S.C. (Supp. V) 3161(a) and (c). District courts therefore are required to assign cases within a district in such a manner as to provide for prompt disposition. Here, in refusing to retransfer the case to Newark, the court referred to the Speedy Trial Act and noted that henceforth cases that previously might have been tried in Newark would in all likelihood be tried elsewhere within the district because of scheduling difficulties (App. 180). Due regard for the convenience of the defendant and the witnesses (see Rule 18, Fed. R. Crim. P.) does not require a court to accord controlling weight to claims of inconvenience where there are sound reasons for not retransferring a case.

3. Finally, petitioner contends (Pet. 14-17) that he was deprived of due process when the government called Racioppi as a witness and, in the jury's presence, Racioppi claimed his Fifth Amendment privilege against self-incrimination prior to receiving immunity. But the prosecutor advised the jury in his opening statement that Racioppi would testify concerning his involvement in the scheme and that it was expected that he would testify under a grant of immunity (App. 229-230). When Racioppi claimed the privilege, the defense could hardly have been surprised. The government's immediate pledge of immunity was properly granted in the jury's presence, for it enabled the jury to assess the significance of the grant of immunity in evaluating the credibility of Racioppi.

The decisions relied upon by petitioner (Pet. 16) do not conflict with the decision below. In those cases, the prosecutor, knowing that a witness would claim the Fifth Amendment privilege, persisted in calling the witness, and thereby created a prejudicial inference of complicity by the defendant, which the defendant could not attempt to dispel because cross-examination was precluded. Cf. *Namet* v. *United States*, 373 U.S. 179, 186-187; *Douglas* v. *Alabama*, 380 U.S. 415, 419. But where, as here, immunity is conferred upon the witness after the privilege is claimed, there is no prejudice because there is no inference of complicity but actual testimony of complicity, which, of course, is subject to cross-examination.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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[3]Petitioner complains (Pet. 15) that the trial judge did not refer to Racioppi's claim of privilege in his instructions, but petitioner had not requested such an instruction.

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